Supreme Court, U.S.
FILED
MAY 29 2007
OFFICE OF THE CLERK

No. 06-1573

In The

Supreme Court of the United States

JOSEPH MICHEL RUSSELL,

Petitioner,

v.

NANCY LYNNE RUSSELL,

Respondent.

On Petition For a Writ of Certioranri
To the Court of Appeals of Virginia

PETITION FOR A WRIT OF CERTIORARI

Joseph Michael Russell, *Pro Se*
6474 Oakwood Drive
Falls Church, Virginia 22041
703-209-9376

INTRODUCTORY STATEMENT

The Court of Appeals of Virginia Opinion allowed the Trial Court on its own motion to invoke continuing jurisdiction over child custody as set forth in Section 20-108 of the Code of Virginia and to terminate Father's custody of his child where there was no petition making any issue, no notice of any controversy, and no change of circumstances since the most recent custody award. This violated Father's Due Process protection of his fundamental interest as a parent in the care, custody, and control of his child.

QUESTION PRESENTED

Does the state lack a sufficiently compelling justification for modifying child custody on its own motion under authority of Virginia Code Section 20-108 where no party had raised any issue and where there was no notice provided as to of what was at controversy?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....iv

PETITION FOR A WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITIONAL AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE PETITION.....6

I. The Decision Below Denies Petitioner's Right as a parent to make decisions concerning the care, custody and control of his child Without Due Process of Law, and Conflicts with Holdings of other State Supreme Courts and with this Court's Precedents.....6

A. Due Process Clause protects fundamental right of Parents concerning the care, custody and control of their children.....7

B. Supreme Courts of Alaska, Illinois, New Jersey and Tennessee decided same question differently.....8

C. Application of Statue is inconsistent with Prior decisions of the U.S. Supreme Court.....9

CONCLUSION.....11

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of the Court of Appeals of Virginia
dated October 3, 2006.....a-1

Order of the Circuit Court of Fairfax County
dated 20 December 2004.....a-18

Order of the Circuit Court of Fairfax County
dated 20 May 2005.....a-19

Order of the Supreme Court of Virginia denying
petition for appeal dated 20 December 2006...a-22

Order of the Supreme Court of Virginia denying
petition for rehearing dated 9 March 2007.....a-23

Transcript (Excerpts)
Hearing December 3, 2004.....a-24
Hearing December 20, 2004.....a-25

TABLE OF AUTHORITIES

CASES: Page

Beck v. Beck, 432 A.2d at 71 (N.J. 1981).....9

Caban v. Mohammed, 441 U.S. 380 (1979).....6

Carson v. Elrod, 411 F. Supp. 645, 649; DC E.D. VA (1976).....5

Doe v. Irwin, 441 F. Supp. 1247 (D.C. Michigan) (1985).....5

Keisling v. Keisling, 92 S.W.3d 374; 2002 Tenn.....9

Lassiter v Department of Social Services, 452 U.S. 18, 27, 68 L. Ed 2d 640, 120 S.Ct. 2153, 2159- 60 (1981)....5

Lehr v. Robinson, 463 U.S. 248, 261-62 (1983).....6

Marriage of Birt. 510 N.E.2d 559, 564 (Ill. App. 1987) 515 N.E.2d 101 (Ill. 1987).....9

May v. Anderson, 345 U.S. 528, 533 (1952).....6

Meyers v. Nebraska, 262 U.S. 390, 399, 401 (1923).....10

Pierce v. Society of Sisters, 268 U.S. 535 (1925).....10

Powell v Pennsylvania, 127 U.S. 678, 686 (1888).....11

Prince v. Massachusetts, 321 U.S. 166 (1944).....7,10

Santosky v. Kramer, 455 U.S. 745, 753 (1982).....5,10

TABLE OF AUTHORITIES – Continued

Page

Smith v. Organization of Foster Families, 431 U.S. 816 (1977)..... 5

Stanley v. Illinois, 405 U.S. 645, 651, 31 L.Ed 2d 551, 92 S.Ct. 1208 (1972).....5,10

T.M.C v. S.A.C 858 P2d 315 (Alaska September 3, 1993).....8

Troxel v Granville, 530 U.S. 57, 65 (2000).....7,10

Washington v. Glucksberg, 521 U.S. 720 (1997).....10

Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972).....5,10

CONSTITUTIONAL PROVISIONS:

U.S CONSTITUTION, Fourteenth Amendment Due Process Clause.....2

STATUTORY PROVISIONS:

CODE OF VIRGINIA Section 20-108.
(Revision and alteration of such decrees).....2,3,7,8,10

CODE OF VIRGINIA Section 20-107.2.
(Court may decree as to custody and support of minor children.).....2

PETITION FOR A WRIT OF CERTIORARI

In the decision below, the Court of Appeals of Virginia held that the Due Process Clause of the Fourteenth Amendment does not require any notice when the trial court on its own motion invokes the continuing jurisdiction allowed by CODE OF VIRGINIA Section 20-108. Mr. Joseph Michael Russell respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Commonwealth of Virginia.

OPINIONS BELOW

The Virginia Court of Appeals decision is contained in a non- published opinion dated October 3, 2006 at Record Nos. 1469-05-4, 2247-05-4, 2585-05-4, 3151-05-4, 0204-06-4 and 1107-06-4. (App. a-1) The orders in controversy concerning custody and visitation are contained in orders entered December 20, 2004 (App. a-18) and final order entered May 20, 2005 (App. a-19) by the Circuit Court for the County of Fairfax, Virginia.

JURISDICTION

Petitioner timely appealed to the court of last resort, the Supreme Court of Virginia, and was denied review by Order of that court dated 20 December 2006. (App. a-22) Petitioner's subsequent petition to the Virginia Supreme Court for a rehearing was denied by Order dated 9 March 2007. (App. a-23) The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. Section 1257(a). Petitioner questions the constitutionality of a statute of a State, and states that service has been made upon the State's Attorney General pursuant to 28 U.S.C. Section 2403(b) and Rule 29(4)(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amendment XIV states in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]"

CODE OF VIRGINIA Section 20-108. (Revision and alteration of such decrees) which states: "The court may, from time to time after decreeing as provided in Section 20-107.2, on petition of either of the parents, or on its own motion or upon petition of any probation officer or the Department of Social Services, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require. The intentional withholding of visitation of a child from the other parent without just cause may constitute a material change of circumstances justifying a change of custody in the discretion of the court."

CODE OF VIRGINIA Section 20-107.2. (Court may decree as to custody and support of minor children) which states: "Upon entry of a decree providing (i) for the dissolution of a marriage, (ii) for a divorce, whether from the bond of matrimony or from bed and board,(iii) that neither party is entitled to a divorce, or (iv) for separate maintenance, the court may make such further decree as it shall deem expedient concerning the custody or visitation and support of the minor children of the parties as provided in Chapter 6.1 (Section 20-124.1 et seq.) of Title 20, including an order that either party provide health care coverage."

STATEMENT OF THE CASE

Without any petition or notice of any issue or controversy, the trial court *sua sponte,* and without identifying any vital or compelling state interest for doing so, scheduled a custody hearing and then terminated father's custody of his child based solely on an in camera review of a psychologist report. [Orders dated 20 December 2004, App. a-18, and 20 May 2005, App. a-19]. Petitioner noted his Constitutional objections [preserved at TR Hearing December 3, 2004, App. a-24; TR Hearing December 20, 2004, App a-25; Order 20 December 2004 Objection No. 2, App. a-18;] and timely noted his appeal [Constitutional objections preserved at Virginia Court of Appeals Appellant Briefs Records Nos. 1469-05-4 Question #1 and 1107-06-4 Questions #2 & #4; Virginia Supreme Court Petition for Appeal Record No. 062213 Question #2 and Petition for Rehearing Record No. 062212 at p. 1].

The Virginia Court of Appeals upheld the trial court ruling [October 3, 2006 Opinion, App. a-6] and the Virginia Supreme Court refused the petition for hearing and petition for reconsideration. This petition for writ of certiorari from the state court of last resort follows:

The continuing jurisdiction over child custody statute set forth in Section 20-108 of the Code of Virginia (150, *as amended*) is repugnant to the U.S. Constitution, both on its face and as applied in the instant case. The statute places no limitation on the exercise of unbridled judicial discretion, even when that discretion is exercised in direct contravention and derogation of a fundamental liberty interest. The statute allows the court to change custody solely on its own motion and provides unfettered exercise of judicial discretion. The failure of the statute to limit the court in child custody matters renders the statute overbroad and fatally defective.

Petitioner argues that this same statute violates the Constitutional rights of both the father and his child to have their most important relationship afforded the highest levels of Constitutional protection. Absent evidence of a compelling state interest (such as a showing of abuse or neglect), the "continuing jurisdiction" statute may never be invoked in a manner grossly inconsistent with a parent's fundamental liberty interest in maintaining consortium with their children. Yet the instant case demonstrates both the fatally flawed, unconstitutional construction of the Virginia continuing jurisdiction statute both on its face and in the manner of application.

As applied in the inferior courts, a custody hearing was conducted and the petitioner-father's custody of his child was terminated based solely on the courts own motion, without any pleading being made or any notice provided describing the issues or controversy before the court. As a matter of constitutional law, however, the issue before this court is whether this statute permits exercise of unfettered judicial discretion to a degree which provided no protection for the primacy of the parent-child relationships.

When no party has moved the Court to terminate father's custody of his child – and the Court, of its own volition – decides to restrict that relationship, according to law, it can only be a matter of "vital and compelling state interest" by which the judge makes his ruling. Yet, no vital or compelling state interest was identified other than the fact that the Virginia Court of Appeals asserted that such a ruling was allowable under the existing statutes.

"There is no doubt that constitutional principles must be strictly observed and rigorously applied in cases involving parent-child relationships, because these intimate

relationships are constitutionally protected." *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972). Following *Yoder* and its progeny, virtually all state courts recognize the underlying strength of parental rights, as articulated for example by a state court in Doe v. Irwin, 441 F. Supp. 1247 (D.C. Michigan) (1985).

The rights of parents to the care custody and nurture of their children is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by the fifth and fourteenth amendments to the United States constitution. In *Lassiter v Department of Social Services*, 452 U.S. 18, 27, 68 L. Ed 2d 640, 120 S.Ct. 2153, 2159-60 (1981), the Court stressed that the parent-child relationship "is an important interest that 'undeniably warrants deference and absent a powerful countervailing interest protection.'" Quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L.Ed 2d 551, 92 S.Ct. 1208 (1972)

The existing Virginia statutes in question cannot be squared against the Constitutional protections afforded all citizens of the United States. "No bond is more precious and none should be more zealously protected by the law as the bond between parent and child." *Carson v. Elrod*, 411 F. Supp. 645, 649; DC E.D. VA (1976)

The U.S. Supreme Court has held that "freedom of choice in matters of family life is a fundamental liberty interest" protected by the U.S. Constitution through vigorous application of the protections of the Fourteenth Amendment's rights of due process. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). This fundamental liberty

interest, which the Court variously refers to as the right of parental autonomy or the right of family integrity, is not diminished because the nuclear family has been fractured by divorce, separation, or if the parents never married. *Lehr v. Robinson*, 463 U.S. 248, 261-62 (1983); See *Caban v. Mohammed*, 441 U.S. 380 (1979). In emphasizing the importance of the fundamental liberty interests at issue here, the Supreme Court has opined that a parent's right to the "companionship, care, custody and management of his or her children" is an interest "far more precious" that any property right. *May v. Anderson*, 345 U.S. 528, 533 (1952)

Once a right has been determined to constitute a fundamental liberty interest, the government must be extraordinarily circumspect in taking any action to impair or diminish that interest.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Denies Petitioner's Right as a parent to make decisions concerning the care, custody and control of his child Without Due Process of Law, Conflicts with Holdings of other State Supreme Courts and with this Court's Precedents.

The statute in controversy does not restrict judicial discretion sufficiently to safeguard against violations of fundamental liberty interests protected and guaranteed by the United States Constitution. As written the Virginia child custody continuing jurisdiction statute (Section 20-108) is repugnant to the U.S. Constitution and inconsistent with the prior decisions of the U.S. Supreme Court.

A. Due Process Clause protects fundamental right of Parents concerning the care, custody and control of their children.

As applied here, the statute in controversy exceeded the bounds of the Due Process Clause and unconstitutionally infringes on the fundamental right of a parent to rear his child. The statue places unlimited control in the hands of the judge to continually change the custody of a child of divorced parents, without regard to lack of any parental petition, notice, or determination of fitness, and with the only requirement that the judge consider "the circumstances of the parents and the benefit of the children." Va. Code Section 20-108

This Court has explained that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made." *Troxel v Granville*, 530 U.S. 72, 73 (2000). The Fourteenth Amendment concept of liberty provides an independent right of the parent in the "custody, care and nurture of the child," free from state intervention. *Prince v. Massachusetts*, 321 U.S. 166 (1944)

The statute is overbroad as written and does not limit judicial discretion to conform with the overarching protections of the parent-child relationships found in the decisions of this Court. The result is that application of the relevant Virginia statutes, as in the instant case, results in wholesale violations of constitutionally guaranteed human rights – namely, a parent's freedom and right to the custody, care and nurture of his minor child. These rights have been held by the United States Supreme Court to be even more precious than any property rights.

In the instant case appealed from, the Virginia Courts held that Virginia Code Section 20-108 provides continuing jurisdiction authority to schedule a hearing and then to terminate custody and that it can be invoked solely on the court's own motion where there had been a final custody order and no petition or notice of controversy was given nor was any evidence taken. This violated the Due Process Clause of the Fourteenth Amendment and appellant parent's fundamental liberty interest in maintaining parental consortium with his child .

When a statue allows terminating child custody and lacks sufficient safeguards to prevent application in such a manner that it overrides a constitutionally guaranteed right, the negative costs to the individual appellant and to society are too great for the Court to defer review of the question presented.

B. The Supreme Courts of Alaska, Illinois, New Jersey and Tennessee decided this same question differently.

In the instant case the Court of Appeals of Virginia has decided an important question in a way that conflicts with the decisions of several of the states court of last resort.

The Supreme Court of the State of Alaska has rule on the same question of when a trial court can decided child custody cases solely on its own motion in its opinion *T.M.C v. S.A.C* 858 P2d 315 (Alaska September 3, 1993). The Alaskan Supreme Court decided that "Whether the trial court, on its own motion, can find a change of circumstances in a child custody case is a question of law....In such cases, the trial court may decide issues on its own motion, **as long as a party has raised them** and both sides have the opportunity to present full testimony." *T.M.C v. S.A.C* 858 P2d 315 (Alaska September 3, 1993). (Emphasis added)

The Supreme Court of Illinois stuck down a sua sponte award, despite statue permitting sua sponte action, where custody was not an issue and trial court received no testimony. *Marriage of Birt.* 510 N.E.2d 559, 564 (Ill. App. 1987) 515 N.E.2d 101 (Ill. 1987).

Similarly, the Supreme Court of New Jersey in *Beck v. Beck* stressed that a sua sponte award of joint custody must have support in the record in order to survive a challenge. Though it allowed sua sponte awards, the court preferred that the parties have the chance to address any new issues that the trial court may raise. *Beck v. Beck,* 432 A.2d at 71 (N.J. 1981)

The Supreme Court of Tennessee has established standards for transferring custody from one parent to the other when no petition requesting a change of custody has been filed and has held that **"The risk of erroneous deprivation of custody of one's children is substantial when no pleadings are filed** informing the parent that a change in custody is being contemplated by the court." *Keisling v. Keisling* 92 S.W.3d 374; 2002 Tenn. Further, that court ruled that "The magnitude of a parent's constitutional right to rear and have custody of his or her children necessitates that notice satisfying the constitutional requirements of due process be given where a change in custody is a issue. id. at 374

C. Application of the Statue in controversy is inconsistent with the prior decisions of the U.S. Supreme Court.

In present case, the trial court's 24 December 2003 Order was final and no change of circumstances subsequent to that order was presented nor was father given notice of any issue at controversy. Nevertheless, invoking the

continuing jurisdiction provided under Virginia Code Section 20-108, the trial court sua sponte and solely on its on motion , terminated father's custody of his child by 20 May 2005 Order. The Court of Appeals ruled that this was allowed under Virginia Code Section 20-108.

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 720 (1997) "The liberty interest at issue in this case - the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interest recognized by this Court." *Troxel v Granville*, 530 U.S. 57, 65 (2000). "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." *Troxel*, 530 U.S. at 66).

"The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 535 (1925)

The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, e.g., *Meyers v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232-233 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753-754 (1982).

CONCLUSIONS

In determining whether or not to grant certiorari the Court need to only consider one threshold question: Whether the Virginia Statute allowing custody of children of divorced parents to be continuously changed solely on the court's own motion as set forth in the Virginia custody statutes on its face, and as construed, may sometimes be applied in derogation of the fundamental, Constitutionally guaranteed liberty interest of parents in the "custody, care and nurture of the child," absent evidence of a clear and compelling state interest concerning the children's health or safety?

The constitutional protection against arbitrary state interference with parental rights should be applied here. Although Code Section 20-108 provides that the court, on its own motion, can modify custody and has continuing jurisdiction and authority to revise or alter custody decrees, it cannot be used in circumstances where there has been no petition made or allegations pled, no notice given, and no evidence taken showing a change in circumstance.

Our government is one whose powers are limited by the Constitution. Where statutes and common-law rules conflict with long established constitutional principles of due process of law, the latter must prevail. See generally *Powell v Pennsylvania*, 127 U.S. 678, 686 (1888). The authorizing Statute (Section 20-108 of the Code) allowing the trial court's sua sponte order changing father's custody as applied in this case violates the fundamental constitution right to due process and cannot override the constitutional requirement in *Troxel*.

The parent-child relationship is a protected constitutional right and there exists a zone of privacy around that relationship which only can be invaded when the state possesses a sufficiently compelling reason to do so. In the present case there is no such compelling reason.

Here there was an agreement between mother and father for shared custody of their son by the 24 December 2003 final Order. There was no change of circumstances since that order alleged or proven. There was no petition or pleading by either parent raising any issue or controversy before the court. Here, several months after the court lost jurisdiction over the matter and based on an in camera review of a psychologist's report, the trial court invoked continuing jurisdiction authority under Virginia Code section 20-108 and decided to hold a custody hearing and terminate father's custody of his son. This violated due process protections afforded both father and son.

Custody orders must bear sufficient respect for the constitutional protections inherent in the parent-child relationship. Where no material change in circumstance affects a child's welfare, the state lacks a sufficiently compelling justification for modifying custody under authority of Virginia Code section 20-108.

The petition for certiorari should be granted.

Respectfully submitted,

Joseph Michael Russell, *Pro Se*
6474 Oakwood Drive
Falls Church, Va. 22041
703-209-9376

COURT OF APPEALS OF VIRGINIA

MEMORANDUM OPINION*
PER CURIAM
OCTOBER 3, 2006

Present: Judges Kelsey, Petty and
Senior Judge Bumgardner

JOSEPH MICHAEL RUSSELL
v. Record No. 1469-05-4
NANCY LYNNE RUSSELL
JOSEPH MICHAEL RUSSELL
v. Record No. 2247-05-4
NANCY LYNNE RUSSELL
JOSEPH MICHAEL RUSSELL
v. Record No. 2585-05-4
NANCY LYNNE RUSSELL
JOSEPH MICHAEL RUSSELL
v. Record No. 3151-05-4
NANCY LYNNE RUSSELL
JOSEPH MICHAEL RUSSELL
v. Record No. 0204-06-4
NANCY LYNNE RUSSELL
JOSEPH MICHAEL RUSSELL
v. Record No. 1107-06-4
NANCY LYNNE RUSSELL

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

FROM THE CIRCUIT COURT OF
FAIRFAX COUNTY
M. Langhorne Keith, Judge
Jane Marum Roush, Judge

(Fred M. Rejali, on briefs), for appellant.

(William B. Reichhardt; Colleen C. Sweeney; William B. Reichhardt & Associates, on briefs), for appellee.

Joseph Michael Russell (father) has filed six appeals arising from custody, visitation, and contempt issues concerning his relationship with Nancy Lynne Russell (mother) and their minor son, Benjamin. Father presents numerous questions on appeal, which will be addressed within the body of this opinion. Both parties request attorney's fees on appeal. Upon reviewing the records and briefs of the parties, we conclude that these appeals are without merit. Accordingly,we summarily affirm the decisions of the trial court. Rule 5A:27.

BACKGROUND

The parties married in September 1991. The couple's final Separation occurred in December 1992. On May 27, 1993, Benjamin, their only child, was born. Their divorce was finalized in 1995.

The parties had informally agreed to a number of visitation arrangements since their separation. When the child was five years old, father and mother were living in separate houses but were within walking distance of each other, and the two agreed to split their time with him during the week; this arrangement was finalized in a 2001 consent order. In an effort to obtain sole custody of the child, mother filed a petition to reopen and modify custody and child support in 2003. The trial court appointed a guardian *ad litem* (GAL) to represent the child's interests.

The parties agreed to a modified custody order on December 24, 2003. The order decreed that the parties would attend counseling sessions with Dr. Victor Elion,

that the parties would make decisions concerning Benjamin together, and that "[i]f the parties cannot reach an agreement as to activities, they shall submit the issue to Dr. Elion or other therapist, who shall make the decision." The order also stated that Dr. Elion would draft a report on the progress of the family counseling for the court to review.

Dr. Elion delivered a written report to the GAL, who asked him to draft a second report. On August 27, 2004, Dr. Elion filed the second report. One of the report's recommendations was that the court reconsider mother's petition for modification of custody. The trial court held a hearing in December 2004 to review Dr. Elion's appraisal of the situation. During that hearing the trial court ordered that a hearing for visitation and custody be held on May 2 and 3, 2005. After the May 2005 hearing, at which Dr. Elion testified, the court entered a custody order on May 20, 2005, granting sole custody of the child to the mother.

Subsequently, mother filed a motion asking the trial court to require father to show cause why he should not be held in contempt for violating the May 20, 2005 custody order. The trial court determined, in a hearing pursuant to this motion on November 29, 2005, that father had violated the custody agreement on numerous occasions. The trial court found father had interfered with mother's visitation rights during weeknights, during Thanksgiving break, had supplied the child with locks to lock himself in his room in mother's house, and used the child to communicate with mother on visitation issues. The trial court found father in contempt of court, but suspended the jail sentence on certain conditions.

A December 9, 2005 order, entered pursuant to a show cause hearing initiated by mother, provided that mother shall have exclusive custody of Benjamin until January 2, 2006. Mother testified at a January 20, 2006 hearing that on December 17, 2005, father drove by and picked up Benjamin in father's vehicle while Benjamin was playing

in a neighbor's yard. On January 23, 2006, the trial court entered an order finding father in contempt, and incarcerated him until he "submits a written plan as to how he will comply with this court's orders and obtain assistance by a mental health professional." Father failed to comply with the trial court's order; his counsel argued that doing so could compromise his due process rights.

After a March 21, 2006 hearing, the trial court issued an order stating that, "Michael Russell shall be released from jail. Pending Michael Russell's submission to the court of a plan to follow the Court's Order all visitation shall be suspended. Michael Russell shall have no contact with Benjamin." Within hours of being released, father called Benjamin on the telephone. In a March 31, 2006 hearing, the court refused to grant father visitation, saying "I think it's clear at this time in Ben's life contact with his father would be toxic."

ANALYSIS[1]

Record No. 1469-05-4, Questions Presented I and II
Scheduling of Custody Hearing of May 2-3, 2005

[1] Father has filed a "Motion for an Expedited Hearing, and Request for Attorney's Fees," arguing that his appeals are "extremely compelling" and that mother is "maliciously prosecuting him." We deny this motion because we find father's appeals to be without merit. Father has also filed a "Motion to Declare Orders Void or to Stay Orders Pending Appeal," arguing that the trial court had no jurisdiction to issue various orders. We deny this motion for reasons provided in the analysis section.

Father contends there was no legal basis for Dr. Elion to suggest a custody modification and that the trial court erred in scheduling the May 2-3, 2005 custody hearing when a final order had been entered in the matter on December 24, 2003 and no petition had been filed for a

change in custody. Father also contends the trial court erred in allowing Dr. Elion to testify and in considering his testimony when he had not prepared a custody evaluation.

"In matters of a child's welfare, trial courts are vested with broad discretion in making the decisions necessary to guard and to foster a child's best interests." Farley v. Farley, 9 Va. App. 328, 328, 387 S.E.2d 794, 795 (1990). Specifically, Code § 20-107.2 provides that "[u]pon entry of a decree providing . . . for a divorce . . . the court may make such further decree as it shall deem expedient concerning the custody or visitation and support of the minor children of the parties." Code § 20-108 states:

> The court may, from time to time after decreeing as provided in § 20-107.2 . . . on its own motion . . . revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require.

"The court, in the exercise of its sound discretion, may alter or change custody or the terms of visitation when subsequent events render such action appropriate for the child's welfare." Eichelberger v. Eichelberger, 2 Va. App. 409, 412, 345 S.E.2d 10, 12 (1986).

In this case, Dr. Elion's recommendation to modify custody provided the court with a sufficient basis to hold a custody hearing. Furthermore, the trial court was within its discretion to revise an existing custody agreement based in part on Dr. Elion's report and testimony. Dr. Elion is an expert clinical psychologist who met with the parents and the child numerous times. He found mother to be responsive during the sessions, and observed that father was unresponsive and uncooperative. He described the parties' relationship as a "case where there is, in terms of harmonious communication or effective communication that would be in the best interest of the child, as being

virtually non-existent." One example Dr. Elion provided was that father was unresponsive to any suggestion that the child's athletic activities should be reduced despite the fact that these activities "took away time from other important aspects of childrearing experiences." The trial court, acting in the best interests of the child, was free to hold a hearing and modify custody based in part on Dr. Elion's informed opinion.

Record No. 1469-05-4, Questions Presented III and IV
Subpoenas

Father contends the trial court erred when it allowed mother to present evidence by Dr. Elion when the doctor had not provided to father's counsel the first report he drafted or the notes from his sessions with Benjamin to father's counsel despite having been subpoenaed for these documents.

In November 2004, both parties served Dr.Elion with a subpoena *duces tecum* and a subpoena for a witness, requesting access to the child's medical records. In a November 12, 2004 motion, the GAL stated that the subpoenas *duces tecum* should be denied on the basis that releasing the records was not in the child's best interests, as Dr. Elion explicitly told the child he would not release this information to his parents.

A subsequent order from the trial court provided that "none of Benjamin's psychological records are discoverable."

> "The trial court's decision, when based upon an *ore tenus* hearing, is entitled to great weight and will not be disturbed unless plainly wrong or without evidence to support it." "Certainly it is true that the legal rights of the parent should be respected . . . but the welfare of the child is to be regarded more highly than the technical legal rights of the parent."

Green v. Richmond Dep't of Soc. Servs., 35 Va. App. 682, 686-87, 547 S.E.2d 548, 550 (2001) (quoting L.C.S. v. S.A.S., 19 Va. App. 709, 724, 453 S.E.2d 580, 588 (1995) (citations omitted)).

Both Dr. Elion and the GAL believed allowing the parents access to Benjamin's medical documents could interfere with his counseling. The trial court was well within its discretion,then, in ruling these records to be undiscoverable in order to protect the welfare of the child.

Record No. 1469-05-4, Questions Presented V and VI
Admissibility of Expert Testimony

Father contends the trial court erred in admitting Dr. Elion's report and giving substantial weight to his testimony when he had been instructed only to report on the status of family therapy. Father also contends the trial court erred in admitting Dr. Elion's report when it contained gross misstatements.

The December 24, 2003 consent order states that "this Order and the efficacy of the family counseling will be reviewed by Dr. Elion . . . within five months from the entry of this Order. A report regarding the efficacy and progress of family counseling shall be prepared for review by the Court and the Guardian *ad litem*." Father argues that Dr. Elion's report and testimony went beyond the limited scope assigned to him by the consent order and that the report misstated the number and intensity of athletic activities Benjamin was involved in and erroneously stated that father had punched Benjamin in the chest.

As the trial court noted at the time, even if true, father's arguments merely go to the weight accorded Dr. Elion's report and testimony. "In determining whether credible evidence exists, the appellate court does not retry

the facts, reweigh the preponderance of the evidence, or make its own determination of the credibility of the witnesses." Wagner Enters., Inc. v. Brooks,12 Va. App. 890, 894, 407 S.E.2d 32, 35 (1991). "As long as evidence in the record supports the trial court's ruling and the trial court has not abused its discretion, its ruling must be affirmed on appeal." Joynes v. Payne, 36 Va. App. 401, 416, 551 S.E.2d 10, 17 (2001).

The trial court did not abuse its discretion by weighing Dr. Elion's evidence as it did and in granting sole custody to mother.

Record No. 1469-05-4, Question Presented VII
Admissibility of Father's Deposition Transcript

Father contends the trial court erred in admitting the entire transcript of his April 2005 deposition into evidence, arguing that the deposition transcript contained hearsay and was prejudicial to father.

"[A] party may, subject to the rules of evidence, introduce an adverse party's discovery deposition as substantive evidence in his own case, whether the deponent is present or not." Horne v. Milgrim, 226 Va. 133, 138, 306 S.E.2d 893, 895 (1983).

> The party offering such a deposition may tender only that part of it he considers relevant. If fairness requires the admission of additional parts, a remedy is provided by Rule 4:7(a)(5). The deposition is, of course, subject to objection on the grounds of authenticity, relevancy, non-compliance with the Rules of Court, or any failure to comport with the rules of evidence.

Id.

Father asserts that the deposition transcript contains irrelevant content and hearsay. He does not, however,

specify which sections of the transcript are objectionable. The deposition transcript consists mainly of father's answers to questions about Benjamin's extra-curricular activities, his relationship to Benjamin and mother, and his participation in family therapy. None of these subjects is irrelevant to the issue of custody. In the absence of specific examples of hearsay or irrelevance, then, this Court cannot conclude the trial court erred in admitting the deposition into evidence.

Record No. 1469-05-4, Question Presented VIII
Judicial Bias

On April 29, 2005, Judge Keith presided over a hearing and issued an order in a separate case in which father was a party. Judge Keith's order involved Benjamin's mental health records, and stated in part that these records were not to be communicated to father. Based on this ruling, father contends the trial court had already formed an opinion as to the admissibility of the child's mental health records and that the judge abused his discretion by relying on opinions formed in this previous case when he granted mother sole custody.

The fact that Judge Keith had presided over a hearing in which father was a party that concerned Benjamin's mental health records does not, by itself, constitute an abuse of discretion on his part. "'Merely because a trial judge is familiar with a party and his legal difficulties through prior judicial hearings . . . does not automatically or inferentially raise the issue of bias.'" Deahl v. Winchester Dep't of Soc. Servs., 224 Va. 664, 672-73, 229 S.E.2d 863, 867 (1983) (quoting Barry v. Sigler, 373 F.2d 835, 836 (8th Cir. 1967)).

> "Frequently, in the disposition of cases, both civil and criminal, a judge is called upon to form and express an opinion upon a matter or issue which may come before him in a subsequent proceeding arising out of the same state of facts. The courts are practically unanimous in the view that neither the forming nor the expression of such a conclusion, under such circumstances, disqualifies a judge in the subsequent matter. [Citations omitted.]"

Justus v. Commonwealth, 222 Va. 667, 673, 283 S.E.2d 905, 908 (1981) (quoting Slayton v.Commonwealth, 185 Va. 371, 376, 38 S.E.2d 485, 488 (1946)).

Father alleges nothing more than that Judge Keith previously issued a ruling involving the admissibility and disclosure of Benjamin's mental health records similar to the one he issued in May of 2005; this fact alone is insufficient to show Judge Keith abused his discretion.

Record No. 1469-05-4, Question Presented IX
Sufficiency Of The Evidence

Father contends the trial court should have given Dr. Elion's report almost no weight and there was little evidence besides the report to support granting mother sole custody of the child.

"The trial court's decision, when based upon an *ore tenus* hearing, is entitled to great weight and will not be disturbed unless plainly wrong or without evidence to support it."Venable v. Venable, 2 Va. App. 178, 186, 342 S.E.2d 646, 651 (1986). Dr. Elion is a clinical psychologist whom both parents designated to evaluate themselves and their son. He conducted numerous clinical sessions with the parents and with the child. The trial judge did not abuse his discretion in relying heavily on Dr. Elion's testimony. The record shows the trial judge explained his decision-making process in detail, and discussed the factors listed in Code§

20-124.3 when deciding the best interests of the child. The trial judge relied on many pieces of evidence in coming to his decision, including testimony from the parties and e-mails the parents had written concerning Benjamin. The evidence was sufficient to support the trial court's decision.

Record No. 2247-05-4
Jurisdiction

On August 19, 2005, the trial court issued an order stating that the non-custodial parent is restricted from visiting with Benjamin during the other parent's half of the summer with him. Mother contends this order merely clarified a May 20, 2005 order. Father argues the order modified the May 20 order and that, because the May 20 order was on appeal at the time, the trial court no longer had jurisdiction. Therefore, father argues, the August 19 order is void.

Provision E of the May 20, 2005 order states as follows:

> The Father shall have visitation for the first half of summer break in 2005 and the Mother shall have the second half. Father and Mother shall alternate their respective halves each year thereafter. Each of the parties shall have regular visitation as described herein for the Father during the other parent's one-half summer visitation time. However, upon prior notice of dates exchanged no later than May 1 of each year, each parent shall be entitled to exclusive visitation during their summer visitation for vacation and travel with their son.

The provision is unclear. The first sentence states that the child will stay with one parent for the first half of the summer, and the other parent for the second half. The third sentence, though, provides that each parent "shall have regular visitation as described herein for the Father during

the other parent's one-half summer visitation time." The third sentence arguably contradicts the first, leaving undefined and unclear the meaning of "regular visitation as described herein for the Father."

The trial judge, during the May 3, 2005 hearing, stated that he simply intended to split the summer "down the middle. And in 2005, the father will get the first half. The mother will get the second half." Then, during the August 17, 2005 hearing, the trial judge stated that he viewed the ensuing August 19, 2005 order as a clarification: "I certainly think I have the power to clarify that today." He also stated:

> The [May 20, 2005] order that was—it's inconsistent. Each of the parties are [sic] to have regular visitation during the other party's one-half summer vacation time. That wasn't my order. That's not what I intended at all. It was supposed to be . . . . One half is all dad's; one half is all mom's, and there's no visitation for the other parent during that time.

Because the May 20, 2005 order contained inconsistent and unclear statements, the August 19, 2005 order was a clarification, not a modification, of the original order. As such, the trial court had the authority to enter the August 19, 2005 order.

Record No. 2585-05-4
Inconsistent Ruling of September 23, 2005 Order

Father filed a motion to unseal the file in this case. The trial court entered an order on September 23, 2005, stating "[Father's] motion is denied because the Court lacks jurisdiction to enter the order while the matter is on appeal. Furthermore, no compelling reason was presented by the defendant that the file should not be sealed."

Father contends the court erred in ruling that the court lacked jurisdiction over the matter and then also ruling that no compelling reason was presented to unseal the file. If a court lacks jurisdiction over a case, it must dismiss. The sentence in the order addressing the fact that no compelling reason was presented by the defendant is merely dicta. See Lofton Ridge, LLC v.Norfolk S. Ry., 268 Va. 377, 383, 601 S.E.2d 648, 651 (2004) (An "alternative justification for the ruling was unnecessary to the holding. As such, it is dicta."). We therefore find no reversible error in the order.

Record Nos. 3151-05-4 and 0204-06-4,
Questions Presented I and II Contempt Orders

Jurisdiction

Father contends the November 29, 2005 order, suspending a jail sentence, and the January 23, 2006 order, imposing a jail sentence, were modifications of the May 20, 2005 order,which was on appeal at that time, and, as such, the trial court lacked jurisdiction to enter those orders.

We do not accept the premise of father's argument. Under Code § 20-124.2(E), the trial court has the "continuing authority and jurisdiction to make any additional orders" which are necessary to enforce a custody order it has previously issued. The November 29, 2005 and January 23, 2006 orders were not entered to modify the May 20, 2005 order; instead, the court entered them to enforce the May 20, 2005 order because of father's failure to comply. Code § 20-124.2(E) gives the court the authority to do so.

Service of Process

Father also argues that procedural defects invalidate the November 29, 2005 order. Specifically, he claims lack of service of process for the January 20, 2006 hearing. However, father presents no arguments, case law, or statutes to support his contention. "Statements unsupported by argument, authority, or citations to the record do not merit appellate consideration. We will not search the record for errors in order to interpret appellant's contention and correct deficiencies in a brief." Buchanan v. Buchanan, 14 Va. App. 53, 56, 415 S.E.2d 237, 239 (1992).

Sufficiency

Father also argues that the evidence was insufficient to find him in contempt.A trial court "has the authority to hold [an] offending party in contempt for acting in bad faith or for willful disobedience of its order." Carswell v.Matterson, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982). In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the trial court. Frazier v. Commonwealth, 3 Va. App. 84, 87, 348 S.E.2d 405, 407 (1986). The offending party then has the burden of proving justification for his or her failure to comply. Id.
Alexander v. Alexander, 12 Va. App. 691, 696, 406 S.E.2d 666, 669 (1991).

At the November 29, 2005 hearing, father admitted communicating with mother through the child and picking up the child from school on Thanksgiving break. These actions were clear violations of the court's May 20, 2005 order and, therefore, were sufficient to find father in contempt.

The December 9, 2005 order provided that "[t]he mother shall have exclusive custodial time during the Winter/Christmas visitation time of 2005" and "[a]fter January 2, 2006 the father shall resume every other weekend visitation from 4:00 p.m. Friday to 7:30 p.m. Sunday." During the January 20, 2006 hearing, mother testified that on December 17, 2005, without prior notice, father took the child while he was playing in his friend's yard and kept him for the weekend. This action was a direct violation of the December 9, 2005 order. The trial court was within its discretion to find father "clearly in contempt of this court's orders."

Father also claims the trial judge found father in contempt not based on the violations alleged in mother's show cause motions, but based on father's own testimony during the hearings. This is untrue, as the contempt order was the result of a combination of the facts alleged in mother's show cause motions and her testimony, and in father's own testimony.

Record No. 1107-06-4, Questions Presented I and II
Modification of Visitation Orders

Father argues the trial court erred in modifying visitation orders while the issue of visitation was on appeal. We have addressed this issue in the section entitled "Record No.1469-05-4, Questions Presented I and II."

Record No. 1107-06-4, Questions Presented III and IV
Void Orders

Father argues the trial court erred in finding him in contempt of court for violating orders that were void. The modification of the visitation orders was not void, though, as we have already explained in "Record No. 1469-05-4, Questions Presented I and II."

Record No. 1107-06-4, Question Presented V
Conditions of Contempt

Father argues the trial court erred in finding that he had not met the conditions of the contempt order. He presents no arguments and cites no law in support of this contention. "Statements unsupported by argument, authority, or citations to the record do not merit appellate consideration. We will not search the record for errors in order to interpret appellant's contention and correct deficiencies in a brief." Buchanan, 14 Va. App. at 56, 415 S.E.2d at 239.

Record No. 1107-06-4, Questions Presented VI
Contempt Finding

Father contends that the trial court erred in finding him in contempt and ordering him to submit a written plan as to how he will comply with the court's orders when father had already submitted such a plan as part of a January 3, 2006 motion. Father also argues the court erred in continuing to find father in contempt after his counsel explained that he did not want to submit another plan for how to comply with the court's orders because he was concerned such a plan would violate his due process rights and harm his ability to appeal.

The trial court set out clear conditions for father's release from incarceration, instructing him to submit a written plan as to how he would obey the court's orders. Father refused to do so. The "plan" he submitted on January 3, 2006 included a provision that Benjamin could visit father as often as he likes, as long as Benjamin is returned to mother's house by 5:30 p.m. This provision was a right the December 9, 2005 order did not grant father. In addition, father continuously disobeyed the court's orders, from picking up Benjamin when the court order forbade it in December of 2005, to refusing to submit a plan as to how he would comply with the court's orders, to telephoning Benjamin within hours of being released from incarceration. The trial court did not err, therefore, in finding father in contempt, in incarcerating him, or in refusing to grant him visitation with Benjamin.

Attorney Fees

Both parties have requested that this Court award costs and attorney's fees for matters related to these appeals. Because father's appeals were clearly without merit, we deny his request and we award costs and attorney's fees to mother. We remand this case to the trial court for a determination of attorney's fees incurred in responding to these appeals. See O'Loughlin v. O'Loughlin, 23 Va. App. 690, 695, 479 S.E.2d 98, 100 (1996).

CONCLUSION

For the reasons stated, we summarily affirm the decisions of the trial court. Rule 5A:27. We remand to the trial court for a determination of the attorney's fees incurred by mother in these appeals.

Affirmed and remanded.

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

NANCY W. RUSSELL, COMPLAINANT

vs. CHANCERY NO.: 131989

JOSEPH M. RUSSELL, DEFENDANT.

This matter came to be heard on the 20th day of December 2004, on the motion this matter be reviewed by the court including Dr. Elion's report.

Upon the matters presented to the Court at the hearing, it is hereby

ADJUDGED, ORDERED, and DECREED as follows:

1) Dr. V. Elion's August 2, 2004 report be made available to the parties and counsel.
2) Alfred Carr is relieved as guardian ad litiem.
3) This matter is set for a hearing on visitation/custody for March 1 & 2, 2005.
4) Discovery can be conducted, however, none of Benjamin's psychological records are discoverable.

Entered this 20 day of December, 2004.

Signed: M. Langhorne Keith
Circuit Court Judge

Counsel for Defendant Seen and Objected to:

1) for the reasons stated in the record;
2) As a denial of Defendant's due process;
3) As to denial of access to his son's therapy records; and
4) As there is no pending petition since the final order of December 2003 from which to measure change of circumstance.

VIRGINIA:
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

NANCY W. RUSSELL, COMPLAINANT

vs. CHANCERY NO.: 131989

JOSEPH M. RUSSELL, DEFENDANT.

CUSTODY ORDER

THIS CAUSE came before the Court on May 3, 2005. Upon the evidence received by the Court, the argument of counsel, and the consideration of the statutory factors regarding the best interests of the child, Benjamin Russell, as more specifically set out in the transcript of the Court's determinations which is incorporated herein by reference,

IT IS HEREBY ORDERED THAT:

1. The Mother shall have sole legal and physical custody of the child. In all major decisions the Mother will consult with the Father, but the Mother retains the final authority to make those decisions.

2. The Father will have visitation with the child on the following terms:

A.Every other weekend the Father will have visitation. Visitation will begin on Friday after school and end Sunday at 7:00 p.m. Any visitation weekend which is followed by a federal Monday or Friday holiday will be extended through that Monday or Friday.

B.The Father should have dinner with the child one night a week.

C.The child can continue to visit between Father and Mother's house as often as he wants to, but he must spend the night with Mother when it is not the Father's visitation. In that regard, unless otherwise specifically agreed or the Father's dinner night, the child shall return to the Mother's house by 8:00 p.m. on weekdays.

D.The Father shall have winter break in 2005 and each odd-numbered year thereafter; Thanksgiving break in 2006 and each even-numbered year thereafter, and spring break in 2007 and each odd-numbered year thereafter.

E.The Father shall have visitation for the first half of summer break in 2005 and the Mother shall have the second half. Father and Mother shall alternate their respective halves each year thereafter. Each of the parties shall have regular visitation as described herein for the father during the other parent's one-half summer visitation time. However, upon prior notice of dates exchanged no later than May 1 of each year, each parent shall be entitled to exclusive visitation during their summer visitation for vacation and travel with their son.

1) The Mother shall have the child with her for the first three days of summer break and for the three days prior to the start of the school year.

2) Any overnight camp attended by the child during summer break cannot exceed three weeks in length. If the time spent at the camp impinges on one parent's visitation time, then the other parent will give up visitation time so that the parents' time is equalized. If the camp impinges on one parent's time then 60 day written advanced notice shall be given.

3) If the child participates in therapy, then neither parent shall discuss what goes on in that therapy with the child.

4) There is to be no ADHD testing until recommended by the child's therapist.

5) Any tournaments or other similar organized activity attended by the child must be agreed to by the Mother, irrespective of whether it occurs during the Father's visitation time.

6) Pursuant to Section 20-124.5 of the Code of Virginia, either party who intends to relocate his or her residence shall give a thirty-day advance written notice of any such intended relocation and of any intended change of address, said notice being given to both the other party, the other party's attorney, and to his Court. Both parties should provide the other with the right of first refusal to take care of Ben when they are out of town.

7) Each parent shall assist the other in gaining full access to report cards and other school records as well as medical, dental and counseling records and any other documents concerning the child in accordance with Section 20-124.6 of the Code of Virginia.

8) The Court's findings and rulings set forth in the attached transcript are incorporated herein by reference and made a part of this Order.

THIS ORDER IS FINAL.

ENTERED THIS 20 DAY OF May, 2005.

Signed: M. Langhorne Keith
JUDGE

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 20th day of December, 2006.

Joseph Michael Russell, Appellant,

against Record No. 062213
Court of Appeals Nos. 1469-05-4, 2247-05-4
2585-05-4, 3151-05-4, 3151-05-4, 0204-06-4,
and 1107-06-4

Nancy Lynne Russell, Appellee.

From the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value, the Court dismisses the petition for appeal filed in the above-styled case. Code 17.1-410(A) (3) and (B).

A Copy,

Teste:
Patricia L. Harrington, Clerk
By:
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 9th day of March, 2007.

Joseph Michael Russell, Appellant,

against Record No. 062213
Court of Appeals Nos. 1469-05-4, 2247-05-4
2585-05-4, 3151-05-4, 3151-05-4, 0204-06-4,
and 1107-06-4

Nancy Lynne Russell, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 20th day of December, 2006 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:
Patricia L. Harrington, Clerk
By:
Deputy Clerk

TRANSCRIPT Excerpts of Hearing December 3, 2004:

Mr. Schinstock (Counsel for Defendant): "There is no petition that is pending before this Court. The only pleading that is before this Court at this time is the measure of a material change in circumstances to 12/24/03. No other pleading is before the Court. None. Dr. Elion is supposed to issue a report at which point we may or we may not know whether there's controversy, relevancy, something from which I can do discovery responses, something from which I can begin to prepare a number of things to include cross examination of Dr. Eion. But there's no other pleading before the Court that would define what Ms. O'Brien [Counsel for Complainant] said about there being an issue regarding the child, there being an issue between the parties. None at all. They resolved that. That's what the 12/24/03 order is." [TR p.12 ll3-20] "And certainly I don't like due process arguments. They're usually the refuge of the last resort, but in this instance I think that would be truly a denial of notice of what's before the Court." [TR p.15 ll17-20] "I sincerely do not know what's at issue between the parties. I came into this case. I had this order. It's clearly a final order. It doesn't preserve in any way this issue as described by Ms. O'Brien. It doesn't call itself a pendente lite order. I have a final order from which a material change in circumstance is going to be measured, so I do not know what's in controversy." [TR p.17 ll8-16]

Ms. O'Brien (Counsel for Complainant): "[T]he issues before the Court are what was in the original petition. Another petition should be filed. Another petition can be filed."[TR p.18 ll3-6]

TRANSCRIPT Excerpts (page 3 lines 4-23)
Hearing December 20, 2004:

THE COURT: Well, it is obvious to me after reading Dr. Elion's report that custody in this matter is going to have to be revisited, and sooner rather than later. It just so happens I'm calendar control this week, so I can give you a date.

Mr. Schinstock [Counsel for Defendant]: Judge, in fairness to my client, I have no idea why that would be sooner rather than later, let alone the amount of time that it would take at this point in time. We do not know what is in that report. Dr. Elion hasn't seen this child since April; so, I'm not exactly understanding the urgency, in any event.

THE COURT: Well, the mother filed for a change in custody over a year ago.

Mr. Schinstock: And an order was entered – a final order. The only thing that was before this Court was the review for the efficacy and progress of family counseling.

THE COURT: I am setting this down to be heard on custody.